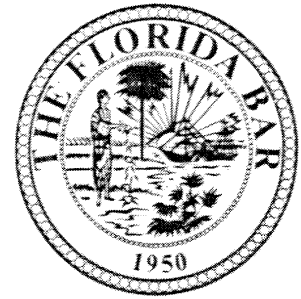


Administrative Law Section Newsletter



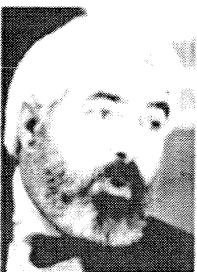
Vol. XI, No. 1

William L. Hyde, John D. Newton II, Co-editors

October 1993

From the Chair

by Stephen T. Maher



It is my great privilege to serve as chair of the Administrative Law Section of The Florida Bar this bar year. We have planned an ambitious schedule of events, and hope that this great variety of programs will both serve the needs of our members and encourage others who are not currently section members to join with us in these programs and in section membership.

One of the strengths of our section is the continuity in leadership provided by our officers and our section's executive council. It has been my pleasure to serve with past and future section chairs, and to serve as a member of the executive council for a number of years. I look forward to my year as chair with great anticipation. Many of the section projects and programs that we will be working on this year have a history in the section and exemplify the continuity in leadership that we enjoy. Some of our efforts will be new this year. I will try to highlight these projects and programs in this column as the year progresses.

Steve Pfeiffer, my predecessor as chair, devoted much of his newsletter columns to a discussion of substantive and procedural law. I will also address developments in the law this year, but I will also venture into the area of bar politics, an area in which Steve has announced that he had little interest. My interest

in bar matters has been reflected in my representation of our section on the Council of Sections, and my election as the founding Treasurer of the Council of Sections this past June.

I believe that the relationship between the sections and the bar is an important subject for discussion because it is an evolving one. It is important to pay attention to how that relationship develops because, as it changes, the bar and the sections may experience changes in their relative responsibilities and finances.

The Council of Sections is still in a formative stage. It just completed final revisions to its proposed by-laws at the September meeting. Those proposed by-laws must now be approved by the bar's Board of Governors. The board may consider them as soon as its September meeting. I will keep you advised of developments involving the Council of Sections as the year progresses.

We have planned a great variety of section programs for this bar year. Carol Forthman has succeeded Bill Dorsey as the section's CLE committee chair. We thank Bill for his important contributions to many years of successful section CLE programming. Carol is the program chair for the traditional Fall CLE program "Practicing Before the Division of Administrative Hearings," scheduled for a live presentation in Tampa on October 14, 1993 and for presentation in videotaped form on October 29, 1993 in Ft. Lauderdale and on November 5, 1993 in Tallahassee.

The Patricia Ann Dore Ninth Ad-

ministrative Law Conference will be held on September 30 and October 1, 1993 in Tallahassee at the Florida State Conference Center. The Conference is again chaired by Bill Williams, and this year it will feature a keynote address by Matt Walsh, Editor of Florida Trend Magazine, titled "Florida's Structural Deficit—It Gets Worse." Professor Shep Melnick, an Associate Professor of Politics at Brandeis University, will speak on Administrative Law and Bureaucratic Reality. Steve Pfeiffer will report on proposed revisions of the Model Rules of Procedure. This was Steve's major project last year as section chair, and he is continuing to lead efforts to revise the Model Rules this year as well. Other speakers include Carol Forthman, who will speak on judicial review and the administrative procedure act, Carlos Alvarez, who will address proposals for streamlining and

continued . . .

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FROM THE CHAIR*from preceding page*

reducing the financial costs and personal trauma of complex administrative hearings, Betty Steffens, who will speak on nonlawyer representation and pro se litigation under the administrative procedure act, John Radley, who will deliver an administrative law update, Bob Benton, who will address attorneys' fees and costs in administrative proceedings, and Al Peacock and Paul Lambert, who will discuss professional licensure proceedings from investigation through appeal. The luncheon speaker will be Dr. David Kirby of Florida State University.

The section is planning a joint seminar with the Local Government Law Section for January 28 in Orlando. Kathy Castor will co-chair that program for the section. Additionally, we will present our annual "Administrative Law Overview" program April 7 in Tallahassee. As you probably already know, the Public Utilities Committee has merged with our section. They have been doing CLE programs for years, and they are planning to continue that tradition as part of our section later in this bar year.

I have a special interest in one of our upcoming events, the Conference on the Florida Constitution, a new event that is scheduled to be held on April 22-23, 1994 in Tal-

lahassee. This event was described in a short article that was included in the last newsletter. I am chairing this event and I am currently trying to guide it through various levels of bar approval. In a recent development, the Council of Sections has agreed to cosponsor this event. The Budget Committee of the Board of Governors now has this event on its September agenda. I will provide more information on this event as it becomes available.

As many of you know, the Florida House of Representatives Select Committee on Agency Rules & Administrative Procedures is considering new legislation in the administrative law area. I serve on a task force that the committee has created to provide input to the committee during this process. While I am pleased that people like me were asked to serve in an advisory role, I have become increasingly concerned about the wide range of proposals for change that have been floated to the task force.

I do not think that significant changes in the Florida Administrative Procedure Act should be made without greater study and reflection than is possible in the present process. I have suggested to the committee staff that another forum might be more appropriate for such far reaching reexamination of the APA. I have proposed that the committee consider revitalizing the Law Revision Council, used by Governor Askew when he reformed the admin-

istrative process in the 1970s. As I have related in one of my articles, The Seventh Administrative Law Conference Chairman's Introduction to the Symposium Issue, 18 Fla. St. U. L. Rev. 607, 610 (1991), the Law Revision Council developed proposed legislation for the Legislature in many areas in the 1960s and 1970s. They played an important role in drafting a modern corporations act, a wrongful death act, an evidence code, a condominium act, a landlord tenant act and the present administrative procedure act.

Revitalizing the council would not be that difficult. The Florida Statutes still authorize a Law Revision Council (see Chapter 13, Part I). There has been no council since the 1970s since one has not been funded and no appointments have been made to it. If committee believes that significant changes are in order, why not let the Law Revision Council do a careful job of studying the structure and consequences of change. If we are not careful, we risk adopting new procedures that may sound good but that, in practice, may create more difficulties than they resolve.

Lastly, please review the article in this issue regarding the section's efforts to establish the Patricia Ann Dore Endowed Professorship at Florida State University College of Law. We have included a pledge card in this issue for your convenience should you or your firm wish to support this very worthy undertaking.

Public Utilities Law Committee Update and Membership Drive

by Diane Kiesling

Since the last Administrative Law Section Newsletter, the Public Utilities Law Committee met on September 10, 1993, in Orlando. We finalized plans for one CLE luncheon and initiated planning for our annual CLE presentation in April, 1994.

The PULC is presenting a CLE luncheon speaker on January 14, 1994, from 12:30 to 2:00 at the Orlando Disney Hilton. The Committee's business meeting will be held following the CLE from 2:30 to 3:30.

The topic of this one credit CLE will be "Ethical Considerations in P.S.C. Practice." The speaker will be Rob VanDiver, General Counsel to the Public Service Commission. A limited lunch menu will be available a couple of weeks before the luncheon so that attendees may select and pay for their meal before the meeting. The lunches will be available for each person who pre-ordered one at 12:30. The speaker will begin promptly at 1:10 so that we can qual-

ify for an hour of CLE credit in Ethics. For those attendees who do not order their meal and pay their admission prior to the day of presentation, attendance for the speaker must be paid for at the door by 1:00. Further details will be available regarding the meal and admission prices by November 1, 1993, and those interested can contact our new program administrator at the Bar, Jackie Werndli at (904) 561-5623.

The Committee is planning its

Spring 1994 CLE presentation for April 29, 1994, in Tallahassee, Florida. The format will be point/coun-terpoint on five areas: Cogeneration (Jim Stanfield v. Suzanne Brownless); Incentives and Externalities (Richard Donelan v. TBA); Water and Wastewater (Wayne Schiefelbein v. Public Counsel representative); Telephone and Cable (TBA); and Status of the P.S.C.—Elected or Appointed/Legislative, Executive, or Hybrid (TBA). Anyone with suggestions or comments on this program may contact Diane Kiesling, the Committee's CLE coordinator for both CLE presentations (904-488-9675).

Further, as a by-product of PULC's merger into the Administrative Law Section and the requirement for Committee members to belong to the Section, we no longer have an accurate membership list. Any member of the Section who is interested in issues involving utility law can become a Committee member by so indicating in writing. It needs to be in writing so that we can compile an accurate list of members, addresses, telephone numbers, and Fax numbers. Since our merger into

the Section, we have been unable to communicate with our members about meetings and activities, which may explain the sudden drop in attendance. The Committee needs you and the benefits of Committee membership include networking, exchanging ideas and information, and participation in excellent educational programs at a reduced rate. Please send your written membership form to Jackie Werndli at the Bar TODAY.

The details of the PULC merger with the Administrative Law Section are still being finalized. An ad hoc committee has been appointed to draft Section By-laws changes needed to effectuate the merger. Those proposals will be presented to

the Executive Council for approval at the Executive Council's next meeting on November 19, 1993. In the meantime, as you can see, the Committee continues to be active.

The Committee's column in the Newsletter (which you are reading right now!) will keep the Section's membership informed of the Committee's plans and activities. Future columns will focus on the utility-related activities and interests of our members. Other contributions to this column will be gratefully appreciated.

Finally, send in your Committee membership form TODAY!

Diane K. Kiesling,
Chair-Elect, PULC

What happened to my newsletter?

Your *Administrative Law Section Newsletter* has changed! In order to conform to the standard format used by other Bar Section newsletters, your newsletter has

been redesigned. This new look should allow for a little more visual interest and be easier to read. We hope you like the change!

Public Utilities Law Committee

The Public Utilities Law Committee of the Administrative Law Section is concerned with the legal, technical and economic issues related to regulated utilities providing electric, gas, water, wastewater and telephone services. If you are a member of the Administrative Law Section and would like to become a member of this committee, please complete and return the form below:

_____ I would like to become a member of the Public Utilities Law Committee.

Name _____ Florida Bar Number _____

Address _____

City/State/Zip _____

Telephone () _____ FAX () _____

Return to: Jackie Werndli, Program Administrator
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

Discovery in Administrative Proceedings: Time for Reform

by Robert Lincoln, Senior Research Associate

FAU/FIU Joint Center for Environmental & Urban Problems Ft. Lauderdale, FL
J.D. (high honors) 1993, Fla. State University College of Law

I. Introduction

The hearing process under Chapter 120, the Administrative Procedures Act (APA), can turn policy making or application into a drawn out, expensive, and burdensome experience. This is particularly detrimental to individuals, small businesses and public interest groups that are either affected by, or that wish to affect, agency policy as it is made through rules and orders. Much of the burden of administrative litigation can be tied to the discovery process. This article examines the problems of the discovery process currently employed in Florida under the APA. It also offers suggestions for amendments to Rule 60-Q, *Florida Administrative Code*, that would bring the discovery process closer to the intended purposes of the APA.

II. Background

The Florida Statutes provide that "[a]n agency . . . or a hearing officer has the power . . . to effect discovery on the written request of any party by any means available to the courts as in the manner provided in the Florida Rules of Civil Procedure. . . ."¹ The Reporter's Comments to the APA indicate that discovery under the APA was intended to permit, rather than require, the full panoply of discovery techniques available under the Rules of Civil Procedure.² This permissive approach, which suggests that a hearing officer could make the full range of discovery options available if necessary, but only if necessary, in a particular case is consistent with the expressed intent of the authors of the APA to provide "opportunities for flexibility and informality in Florida administrative processes."³

DOAH has taken the permissive grant of authority provided by the statute and made it mandatory. Rule 60Q-2.019(1), *Florida Adminis-*

trative Code, provides that "[p]arties may obtain discovery through the means and in the manner provided in Rules 1.280 through 1.400, Florida Rules of Civil Procedure." Under this rule, hearing officers *must* give parties full access to any discovery procedure available in a civil trial; the discretion to tailor discovery to be appropriate to the needs of the particular hearing involved has been removed. Instead of the "flexible and informal" process envisioned by the authors of the APA, discovery in administrative hearings has become the formal, legalistic process used in civil trials.

III. Problems with Discovery under the Rules of Civil Procedure

Formal discovery in administrative proceedings presents three related (and, perhaps, obvious) problems: delay, complication, and expense. Each of these problems increases the formality of the process, decreases its availability to citizens, small businesses and public interest groups, and each is, therefore, inconsistent with the intent of the APA, as expressed in the DOAH rules, to "promote the just, speedy and inexpensive determination" of cases.⁴

Discovery under the civil rules presents several sources of delay. While responses to the various forms of discovery (interrogatories, requests for production or admissions) can generally be had within 45 days, extensions of time are common. Furthermore, if the responses are insufficient, multiple requests must be made before a hearing officer can sanction a party for failure to comply. This creates an incentive to dissemble or prevaricate in any party that would benefit from delay. Under the rules, depositions of opposing parties, witnesses and experts may be taken without refer-

ence to the value of a deposition as opposed to other means of getting necessary information. Between interrogatories, requests for admission, and depositions, the discovery process can cause the hearing process to drag out for months.⁵

The use of the civil discovery rules also increases the complexity of administrative litigation. The language and process of discovery under the civil rules is intricate enough that persons who are not attorneys can be expected to have difficulty in properly framing requests, and even experienced attorneys may find themselves spending unreasonable amounts of time to draft "bullet-proof" discovery requests. This gives opposing attorneys room to avoid providing legitimate information. Conversely, attorneys opposing a non-represented party can file numerous objectionable or improper requests and rely on the ignorance of the party to insulate them from sanctions for such behavior.⁶ Furthermore, the process of compelling discovery provides additional technical requirements that add time and complexity to the process.⁷ The complexity of the process works a severe disadvantage to non-attorney representation of parties, including pro se representation, and adds significantly to the general hassle of administrative litigation for all parties.

Finally, discovery under the civil rules adds greatly to the expense of litigation, both financial and emotional. First, the broad scope of permissible discovery means that participation in an administrative hearing may open a party up to extensive inquiry into areas that are almost wholly irrelevant, including discovery whose true purpose is to harass or intimidate. Answering large numbers of complex interrogatories or retrieving and copying documents is expensive in time, ma-

terials, costs and often in privacy. Depositions of witnesses, especially experts, are expensive in travel time, witness fees, attorney fees and transcription costs. Finally, most litigants will have to pay attorneys to handle discovery because of the complexity of the process. Taken together, these costs make administrative litigation as expensive, and therefore unavailable, as civil litigation.

Under the current regime, then, effective access to the administrative process is effectively rationed to those parties who can afford to fund extensive efforts by attorneys. In turn, the attorneys who are currently engaged in administrative practice have a vested interest in running administrative litigation in exactly the same fashion as civil trial litigation is run: with expensive, extensive, and often unnecessary discovery; by obstructionist tactics designed to draw out discovery and deny information to the other side; by turning administrative litigation into a forum that is better suited to determining private rights rather than public policy. None of these results is consistent with the intent of the APA.

IV. Solutions

A) *Defining the Boundaries*

A clear understanding of the purpose of administrative litigation is necessary to any effective effort to reshape discovery in those proceedings. A vital distinction is that between penal actions and those that involve permitting or rulemaking. Penal actions include license revocation and cases involving administrative sanctions for violations of statutes or regulations. Such actions are more like traditional criminal litigation in that the essential issue is "who did what." In such actions—especially because penalties are involved—the additional protections provided by traditional civil discovery are probably worth the expense, and perhaps necessary to ensure that due process is provided.⁸

The purpose of rulemaking and permitting hearings is to provide an independent check on 1) agency factfinding and 2) agency interpretation of statutes and rules. Additionally, these hearings serve the pur-

pose of forcing agencies to clearly articulate the basis of their interpretation. The "facts" involved are less likely to turn on an objective "who did what" than interpretations of "what will happen if," that is, evaluations of conditions and expectations. Even in permitting cases, the "facts" that are likely to be in dispute are expert opinions or interpretations rather than "objective" facts. Under such situations, the "conflict" that is being resolved by the hearing officer is different than in penal cases; the issue is not so much "what happened" as "whose interpretation is more appropriate or justified."

The key difference between the penal cases and the policy cases is that the objective facts are ultimately less important. Traditional discovery tools that are predicated on helping parties become aware of the objective facts are less useful in hearings under the APA than in civil litigation because full disclosure of the relevant facts is 1) required of the agency under the Public Records statutes and 2) in the best interest of a permit applicant or a challenger to a rule. The primary purpose of discovery in APA hearings seems to be the search for impeachment material rather than the search for "truth." Much discovery in these cases involves the deposition of experts and agency staff in the hope of getting statements that can be used to undercut later testimony in front of the hearing officer, rather than to allow the parties to "understand" the case. While some parties may consider this valuable, the cost is not worth the benefit when the purpose of the hearing is considered: allowing extensive discovery for what amounts to a fishing expedition for inconsistent statements is not necessary for either the function of the hearing or its fairness.

A reform of administrative discovery should therefore accomplish the following:

- 1) Allow full civil discovery in "penal" cases such as professional discipline and enforcement actions;
- 2) Provide for disclosure of relevant "objective" facts in permitting and rule-making cases without allowing overbroad inquiries or evasive responses;

and

- 3) Provide sufficient information about the testimony of opposing witnesses to allow effective cross examination, without allowing unnecessary depositions.

B) *Suggested Reform.*

One simple way to reform discovery would be to amend the DOAH rules governing discovery to provide for a comprehensive discovery order and appropriate changes to the methods for compelling discovery. The parties would suggest the scope and nature of the information necessary for the conduct of the hearing and the hearing officer would direct the parties to prepare the appropriate requests (interrogatories for identification of witnesses and facts, requests for production for documents, etc) which the *hearing officer* would then enter and send to the parties. The parties would then respond. Where depositions are requested, the order would contain limits on the scope and nature of the deposition and perhaps even the schedule. The primary difference from current practice would be that the parties would have to justify their requests before they were made and that the discovery request would be an order of the hearing officer. However, this reform would likely have a great effect on the behavior of the parties during discovery.

First, the reform would change the motion to compel discovery into a motion to compel compliance with the hearing officer's order. Because failure to comply with a reasonable order is a ground for sanctions under the APA,⁹ parties would be far more hesitant to give insufficient, evasive or incomplete responses or to manufacture perceived ambiguities to try to justify such responses. In effect, the threat of sanctions for failure to comply with the order would require parties to make a good faith effort to comply the *first time*. This would also make it more likely that updates to the information would be made on a timely and reasonable manner—requests for extensions would have to be justified to the hearing officer, rather than another attorney.

Furthermore, because the scope of

continued . . .

DISCOVERY

from preceding page

a request would have to be justified to the hearing officer, parties would be less likely to use discovery as an offensive weapon. The scope of requests would probably be more reasonable and parties would have an incentive to "front load" their requests at the early stages of the process, rather than strategically timing their requests to impose the greatest inconvenience to the opposing side. In short, the parties would behave more reasonably in both making requests and responses.

The result could be a significant decrease in the overall time and expense involved in the hearing process. Additionally, this procedure would aid non-lawyer representatives and pro-se litigants significantly in navigating the process. This reform also would allow the hearing officer to tailor the process to the needs of the particular hearing, including, in appropriate cases, turning discovery over to the parties under the civil rules as is current practice.

Three problems might limit the effectiveness of this reform. First, it might place unreasonable demands on the hearing officers. It might be that the time it would take to sort out discovery ahead of time would be greater than the time currently needed to oversee discovery disputes; this would increase the burden on the hearing officers. Given the pervasive problems that seem to occur in discovery, however, this re-

sult seems unlikely. Second, the hearing officers might not use their oversight to limit the realm of discovery, but simply "rubber stamp" all requests; this would effectively nullify the reform. This result may be more likely because many of the hearing officers are former trial attorneys and may be more sympathetic to the mores of the attorneys than the public policy issues involved. Finally, the "discovery order" approach might be insufficient to limit the number of depositions or their length; the reasonableness and utility of a given deposition would be hard to police once the deposition was permitted.

V. Conclusion

The unbridled use of civil discovery in administrative hearings produces results that are inconsistent with the intent of the APA. The current DOAH rules that permit and indeed require the use of the full panoply of civil discovery techniques creates unnecessary cost, complexity and delay in the administrative process and should not be tolerated outside the realm of penal actions. To a policy-minded observer, the current system of discovery significantly interferes with the purposes of the APA by making administrative processes so expensive and complicated that effective participation by individual citizens and public interest groups is limited. The result is that wealthy individuals, companies or lobbying groups can work through well connected and experienced attorneys to dominate the administrative process.

DOAH should reform discovery in non-penal cases by providing that the hearing officer should enter a comprehensive discovery order after motions from the parties. Reforming discovery may be one step in creating a more democratic state and implementing the intent of the APA to provide speedy, just, and inexpensive determinations of administrative issues.

Endnotes:

¹ Fla. Stat. §120.58(1)(b) (1991).

² "A general grant of powers is made for the conduct of administrative proceedings, rather than authorizing full discovery and the other formalities of the Florida rules of civil procedure." ³ Florida Admin. Practice, Reporter's Comments 21 (emphasis added).

³ *Id.* at 3.

⁴ Rule 60Q-2.024, Fla Admin. Code.

⁵ Nowhere is the problem more severe than in rule challenge proceedings. The requirement of § 120.54(4) (c), Florida Statutes (1991), that rule challenge hearings be held within 30 days is constantly, if not universally, ignored in order to provide time for discovery. This practice gives challengers unwarranted leverage to bargain with agencies to modify rules by allowing any case that can survive a motion to dismiss to drag out for months. It is also particularly useless in rule challenge cases, wherein the agency need only demonstrate that the rule is minimally rational and that all the information brought forward to the agency has been considered.

⁶ This is particularly true of requests for admission, where an uncomprehending party may find that they have lost the case for failure to understand the nature of the discovery request.

⁷ The DOAH rules complicate this further by requiring a motion to compel to include each original request, the opposing party's response and the reasons the response is inadequate. In a case with extensive interrogatories, admissions, or requests for production, this puts a clear advantage in the hands of a party with deep pockets or lots of time.

⁸ While due process in administrative hearings generally requires only that the parties receive adequate notice and an opportunity to be heard in a "fair hearing" before an impartial tribunal, *see, e.g.* Canney v. Board of Public Instruction, 278 So. 2d 260 (Fla. 1973) 262-63, the types of procedural safeguards required at any given hearing varies with the character of the hearing. *Hadley v. Dep't. of Administration*, 411 So. 2d 184, 187 (Fla. 1982). When hearings involve penal issues, such as fines or the revocation of a license, the courts are apt to require greater protections. *See generally*, *Buchman v. State Board of Accountancy*, 300 So. 2d 671 (Fla. 1974), *State ex rel Vining v. Fla. Real Estate Commission*, 281 So. 2d 487 (Fla. 1973) (holding that due process in penal administrative hearings includes a right to remain silent).

⁹ Fla. Stat. §120.65 (10).

This newsletter is prepared and published by the Administrative Law Section of The Florida Bar.

- Stephen T. Maher, Coral Gables Chair
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Case Notes

September 28, 1993

by John Radey and
Elizabeth McArthur

A divided Florida Supreme Court says that the Department of Community Affairs, not the applicant, has the burden of proof in some 120 cases. In *Young v. Department of Community Affairs*, 18 FLW S476 (Fla., September 9, 1993), the 3d DCA had held that in an appeal by the Department pursuant to section 380.07, Florida Statutes, of a county order issuing a land clearing permit within an area of critical state concern, the burden of persuasion and burden of going forward rested on the permit applicant. The Supreme Court quashed the 3d DCA's decision, holding that the burden of proof and burden of going forward was on the Department. The Court determined that section 380.07 requires a de novo hearing under Ch. 120, despite use of the word "appeal", and then applied the general rule that the burden of proof in de novo administrative hearings is on the party asserting the affirmative of the issue. The hearing officer had determined that the affirmative of the issue was being asserted by the permit applicant, relying on the *JWC* case. However, the Court distinguished cases like *JWC*, involving challenges to proposed agency action. In this case, Monroe County was not a state agency. Thus, its permit decisions were not proposed agency action. Monroe County entered a valid order, the effectiveness of which was stayed by the Department's appeal under section 380.07. The Department was therefore the party asserting the affirmative that the permit orders were not in accordance with Ch. 380 (an affirmative not).

Justice Barkett wrote a special concurring opinion, joined in by Justices Kogan and Shaw. Justice Barkett disagreed that the reference to Chapter 120 in section 380.07 necessarily requires de novo hearings simply because Florida cases have generally interpreted section 120.57 as requiring a de novo hearing. Instead, her opinion was that Ch. 120

proceedings per section 380.07 are different, not de novo. The language used in the statute is language of the traditional appellate process. She concluded that by use of the word "appeal", the legislature indicated that the appellant has the ultimate burden of persuasion with local government's decision being entitled to a presumption of validity. She concluded that the reference to Ch. 120 means that the hearing should encompass more than just record below; new evidence can be presented (new, but not de novo). Justice McDonald dissented, and would approve the holding that the burden of going forward and the burden of persuasion always rests upon the applicant through all hearings.

But the Supreme Court seemed more together in *Department of Professional Regulation, Board of Accountancy v. Rampell*, 18 FLW S374 (Fla., July 1, 1993), where it declared invalid statutes and rules prohibiting CPAs from personally soliciting clients and from making competitive bids for professional engagements as unconstitutional restrictions of protected commercial speech. As to soliciting clients, the Florida Supreme Court followed the recent U.S. Supreme Court opinion in *Edenfield v. Fane*, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993), which held that the Florida DPR rule prohibiting solicitation was an unconstitutional infringement on the right of free speech. As to the competitive bidding prohibition, the Court likewise determined that the statutory and rule regulation could not withstand constitutional scrutiny, because it did not directly advance a substantial governmental interest.

More food for thought in the Department of Community Affairs is found in *Killearn Properties, Inc. v. Department of Community Affairs*, 18 FLW D1837 (Fla. 1st DCA, August 16, 1993) where a Department DRI final order was reversed in part and affirmed in part. One issue was whether a one-page Development Order ("DO"), approving an Application for Development Approval ("ADA") "as stated" in the ADA could be construed as imposing

a ten-year buildout deadline based on the ADA's estimation that development would conclude in 10 years. The court held that such a requirement, with a heavy price to pay for noncompliance, could not be implied from estimates in the ADA. On a separate issue, the court affirmed the Department's order finding that the DO required development within the DRI to be contemporaneously connected with a central sewage system. However, as to two purchasers of property within the DRI, the court held that the Department was estopped from enforcing the DO. A key fact in the court's estoppel holding was that the DO was never recorded in public records.

Following a formal administrative hearing under section 120.57(1), and issuance of a recommended order, what effect does a voluntary dismissal by the petitioner have? That may depend on the status of the petitioner and/or which appellate court answers the question. In *Saddlebrook Resorts, Inc. v. Wiregrass Ranch, Inc., and Southwest Florida Water Management District*, 18 FLW D1590 (Fla. 2d DCA, July 9, 1993), the court in a split decision held that after issuance of a recommended order, a voluntary dismissal by the third party who initiated 120.57(1) proceedings to challenge preliminary agency action granting a permit *did not* deprive the agency of jurisdiction to proceed with a final order based on the recommended order. The court relied in part on a rule of the SWFWMD providing that parties with a right to a formal administrative hearing could waive that right and request an *informal* hearing, which the agency could grant at its option. The court without discussion equated waiver of the right to a formal hearing by requesting an informal hearing under the agency's rule with filing a notice of voluntary dismissal. Thus, the court concluded that, at least where the dismissing party was not the applicant itself, the agency had the option under its rule to continue with the formal hearing process by proceeding to enter a final order based on the recommended order. The major-

continued . . .

ity disagreed with the contrary holding of the First DCA in *John A. McCoy Florida SNF Trust v. Department of Health and Rehabilitative Services*, 589 So.2d 351 (Fla. 1st DCA 1991). The dissenting opinion by Judge Parker would follow the *McCoy* precedent absent an agency rule prohibiting voluntary dismissals or where there is an agency rule like Rule 1.420 of the Florida Rules of Civil Procedure, requiring a motion for dismissal which can be denied.

A second procedural decision favoring the agency position is found in *Environmental Resource Associates of Florida, Inc. v. State of Florida, Department of General Services*, 18 FLW D1975 (Fla. 1st DCA, September 3, 1993). Judge Barfield wrote the majority opinion, upholding DGS' denial of an administrative hearing where the request for hearing was mailed the day before the 21-day clear point of entry was up, but was not received by DGS until 4 days after the clear point of entry deadline. The clear point of entry notice was provided, and clearly required that a request for hearing be "filed" within 21 days. Judge Barfield's opinion rejected the arguments that preparation and mailing of the petition within the 21-day period was sufficient to show intent not to waive the right to a hearing, and that equitable tolling should apply to deem the request timely filed. Judge Barfield noted that to trigger equitable tolling, there must be more than just a failure to timely meet a filing deadline; the equitable doctrine would apply only if the petitioner was misled or lulled into action or in some extraordinary way had been prevented from asserting his rights, or had timely asserted them in the wrong forum. Judge Ervin concurred with Judge Barfield, but stated his view that the case was a straightforward clear point of entry case. A clear point of entry was given and appellant failed to take the opportunity, resulting in waiver of the right to hearing. Judge Zehmer dissented, stating his view that the failure to request a hearing within 21 days should only create a rebuttable presumption of waiver, and the facts of this case should be sufficient to rebut presumption of

waiver and to apply equitable tolling. He asserted a direct conflict between the majority decision and *Stewart v. Department of Corrections*, 561 So.2d 15 (Fla. 4th DCA 1990), where a filing that was late by one day was accepted. There, one day late. Here, four days late. Judge Zehmer argued that Chapter 120 should allow for flexibility to accommodate a minor infraction of procedural rules to avoid the ultimate penalty of losing one's rights.

The agency did not prevail when it rejected a license applicant's self-serving testimony. In *Martuccio v. Department of Professional Responsibility, Board of Optometry*, 18 FLW D1788 (Fla. 1st DCA, August 12, 1993), the court reversed the Board of Optometry's final order denying an application for licensure as a Florida optometrist. At issue in the formal administrative hearing was the applicant's scoring on the clinical portion of the exam, where two examiners differed in their scores. The applicant himself, licensed in two other states, testified and qualified as an expert in optometry. His testimony was relied on by the hearing officer in finding that one of the examiners inappropriately scored the applicant. The Board reversed the findings, concluding that the applicant's testimony could not be relied on as competent substantial evidence because it was self-serving and was controverted by the examiners' scoring (neither examiner testified at the hearing). The court confirmed the general principle that it is for the hearing officer to judge credibility of witnesses, then went on to say that "[w]e choose not to discard these fundamental principles of administrative law simply because the hearing officer has judged the credibility of fact and opinion testimony presented by the applicant, who has himself qualified as an expert witness." The court cited to the Florida Evidence Code and commentary noting that persons having a pecuniary or proprietary interest in the outcome of a case are not disqualified as witnesses; instead, their interest merely goes to credibility. The court also noted that the applicant's lack of licensure in Florida did not preclude qualification as an expert

witness, if qualifications were otherwise established as they were. Thus the court concluded that the hearing officer was within her prerogative in relying on the applicant's testimony as competent substantial evidence; the Board, on the other hand, exceeded its authority by rejecting findings supported by competent substantial evidence.

When a statute provides that an agency shall adopt criteria, but no deadline for adoption is imposed, might 20 years be too long? Maybe so. In *Concerned Citizens of Putnam County for Responsive Government, Inc. v. St. Johns River Water Management District*, 18 FLW D1643 (Fla. 5th DCA, July 23, 1993), the court reversed the trial court's dismissal of Concerned Citizens' complaint for injunctive relief to require the water management district to act on a legislative mandate, holding that the complaint stated a cause of action. The legislation at issue was the 1972 adoption of section 373.042, providing that water management districts shall establish minimum water flows and minimum water levels for various areas within the district. It was undisputed that with 2 exceptions, the St. Johns District had not set minimum flows and levels. The court rejected the District argument that the statutory "shall" was directory, not mandatory, since no deadline was set. Instead, the court interpreted the lack of a deadline to mean that the District was to act within reasonable time. The court also rejected the District's argument that the court could not interfere with a district's administration absent a patent violation of law or a palpable abuse of authority. The court distinguished cases relied on by the District as all involving actions at least facially within the discretion of governmental agencies, whereas this case does not involve discretionary action. In reversing the dismissal and remanding for trial, the court noted that Concerned Citizens should have opportunity to present its case, and "while it is difficult for a layperson to imagine how the water supply can be managed without the establishment of minimums, the District should have the opportunity to answer."

ACCESS: Administrative Case Compendium & Electronic Search System

by William L. Hyde

Earl, Blank, Kavanaugh & Stotts, P.A.
Tallahassee, Florida

For several years now, the Division of Administrative Hearings and Sharyn Smith, Division Director, have been engaged in an herculean effort to compile hard copies of administrative recommended orders, final orders, and where appropriate, appellate court decisions on appeals of those administrative orders and then convert those hard copies to an electronic data base, working backward in time. They have now scanned in or keyed in (where the copies were bad) all available administrative orders and most related appellate opinions through 1985. It is hoped that the orders and opinions from the first decade of DOAH's existence (1974-1984) can ultimately be included in this electronic data base; however, that will be a considerably more difficult task, as all of those administrative orders will have to be manually keyed into the system, and additional funding will be required. New orders and court opinions are scanned in daily.

What DOAH has now, however, is full text retrieval on approximately 8,000 orders, give or take a few. Over the years, unfortunately, some orders have been lost or cannot otherwise be located (e.g., the recommended order in the seminal case of *McDonald v. Dept of Banking & Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977)), but most of DOAH's orders at least back through 1985 have now been converted to the electronic data base. There are also data bases for the Comptroller/Department of Banking & Finance (bank applications), Governor's Office (e.g., Land and Water Adjudicatory Commission), and Department of Community Affairs (binding letters).

The significance of this effort should be manifest to anyone with more than a passing knowledge of Westlaw or other computer-based electronic retrieval systems. Now, by using a computer available at

DOAH's headquarters in Tallahassee, an administrative law practitioner can conduct electronic searches for important or relevant administrative law decisions by DOAH case number, DCA number, agency case number, and/or Southern 2nd citation. Where such facts are not known, one can search by identifying the name of the petitioner, respondent, and even intervenor. Cited statutes or rule numbers are likewise a search tool, as are recommended order dates, final order dates, DCA opinion dates, agency at issue, case suffix, and even hearing officer. Once the order is found, moreover, all of the above information is included, as is a full text of the recommended order, the final order (if it differs from or modifies the recommended order) and, where appropriate, the appellate opinion. Word search is not yet available.

Currently, this public access to this system is only available at DOAH's headquarters. Additional access will soon be provided through a UNIX system for easier outside access, and DOAH has recently entered into a contract with Darby Pub-

lishing Company to publish the data base on CD ROM with monthly or bi-monthly updates.

The system can be used at DOAH simply by making appropriate arrangements with Ann Cole at 904-488-9675 in the DOAH clerk's office. Hard copies are available at the cost of 25 cents per page, which is a relative bargain.

First-time users can get a crash course at DOAH for use on the system, but to further that process we have included here DOAH's manual for utilizing ACCESS. What follows is a representative example of a bid dispute, DOAH Case No. 92-001779BID, decided by Hearing Officer William J. Kendrick. Where information has been left blank (e.g., rule number), that means there is no appropriate reference therefore on the text. The first two lines of the text, which represents a summary of the holding, is included at the bottom of this example. From that point on, one need only press a key to examine the text of the order(s).

Following the representative example are the basic rules of thumb for utilizing ACCESS, steps to

continued . . .

ADS - 5.1.3 (CTOS)

Next or Prev Page keys to view cards|GO to retrieve order|FINISH to exit.

You have mail. *

ACCESS INDEX LIST	
DOAH CASE#:	92-001779 BID
PETITIONER:	TOXICOLOGY TESTING SERVICE INC
RESPONDENT:	DEPT OF CORRECTIONS
INTERVENOR:	
AGENCY:	COR/ Dept of Corrections
AGENCY CASE#:	
DOAH CNSL CASE#:	
STATUTES:	287.057(1)
HEARING OFFICER:	KENDRICK WILLIAM J. KENDRICK
DOAH RO:	05/20/92
DOAH FO:	
DOAH RO/FO CORR/MISC:	
AGY FO ISSUED:	06/02/92
AGY FO FILED:	06/03/92
AGY FO CORR/AMEND FILED:	
AGY REMAND FILED:	
AGY ACTION:	AP
ADOPTED IN PART OR MODIFIED	
DCA#:	
DCA OPINION FILED:	
DCA REMAND ISSUED:	
So.2d CITE:	
RULE NUMBER:	

Formula in published RFP contained error that agency corrected when it assessed bids. Agency action found not improper where bidder not rely on formula

search by, additional information, standard typing instructions, agency/division search codes, case suffix cross-reference code reports, and hearing officer cross-reference code

reports.

Going to DOAH may constitute something of a temporary inconvenience to those wishing to use ACCESS. However, with a little bit of

luck (and legislative funding), greater and far easier public access such as through computer modems will eventually be available simply by telephoning DOAH.

BASIC RULES OF THUMB

- READ THE PROMPTS AT THE TOP OF THE SCREEN FOR GUIDANCE!
- Pressing [HELP] will either display a window list of possible entries or it will display a window with instructions.
- To activate or select a function from a list or menu press [GO].
- To discontinue a function or clear it off the screen press [FINISH].
- The arrow keys and the [RETURN] key may be used to navigate between fields and on menus.
- Functions keys ([F1], [F2]..., [F10]) are used to make selections from the main menu; and, when a function strip is displayed on the screen, the function keys will initiate the process indicated on the strip.
- To clear an entry for one field, hold down the [CODE] key and press the [DELETE] key.
- All dates must be entered in the format MM/DD/YY. For example: 12/31/89.
- All case numbers must be entered in the format YY-NNNNNN. For example: 89-002134.
- Refer to the Appendix of this book for listings of Hearings Officer codes, Case Suffix Codes, Agency/Division Codes and standard types of entries used for ACCESS database information.
- Document printouts include all historical case documentation that has been filed with the Division of Administrative Hearings. A document may consist of a recommended order, a final order, a corrected/remanded order, a DCA opinion and/or a DCA Corrected/Remanded Opinion.

STEPS TO SEARCH BY . . .

- 1) Select the desired agency from the ACCESS main menu by pressing the corresponding function key. For example, to search recommended and agency final orders filed with the Division of Administrative Hearings . . . press [F4]. Documents unique to a specific agency may be accessed by selecting that agency name from this menu. For example, Banking & Finance Orders of General Application or Declaratory Statements may be accessed by pressing IF5—Office of the Comptroller.
- 2) When the search screen displays, a function strip will also display providing five options. To start entering your search criteria press the function key corresponding to the desired search option.

[F1] CLEAR SCREEN

Clears the screen of any data which you may have entered in a previous search.

[F5] BY ANY CASE#

Allows the entry of the DOAH Case Number, Agency Case Number, DCA Case Number or Southern Second Cite Number for direct document identification and retrieval. Utilizing this option will start the cursor in the DOAH case number field; but, the other fields may be accessed for entry by pressing the Up Arrow, Down Arrow or the [RETURN] key.

[F6] BY NAME

Allows the entry of the Petitioner Name, Respondent Name, Intervenor Name, Hearing Officer Name and/or Agency Name for document identification and retrieval. *Utilizing this option will start the cursor in the Petitioner Name Field;* but, the other fields may be accessed for entry by pressing the Up Arrow, Down Arrow or the [RETURN] key. The short field next to the long field for Petitioner, Respondent and Intervenor is utilized for proper last names only. Please refer to page 4 "Searching for Proper Names. . ." for instructions on how this field is best utilized. Company and Agency Names must be entered in the Long Field ONLY.

[F7] BY OTHER

Allows the entry of all criteria listed on the screen (except case numbers) for document retrieval. *Utilizing this option will start the cursor in the first Statute field;* but, the other fields may be accessed by pressing the Up Arrow, Down Arrow or the [RETURN] key.

[F8] QUICK VW BY

Requires the entry of the DOAH Case Number ONLY. This is the fastest means of accessing documents.

- 3) After pressing the desired function key, the system will highlight the first field ready for information. Fill out any of the fields pertinent to the selected search option. When all the desired criteria has been entered, press [GO].

NOTE: *Entries in multiple fields will produce more exclusive search results. For example, if the hearing officer name as well as the RO date is entered, the system will only return information which meets both name and the date entries.*

- 4) If you had previously selected the "Quick View By #" or [F8] the system will immediately display the document. Otherwise, the system will display a function strip with additional options. At this point you may, press "Confrm Search" or [F8] to activate the search process or [F1] to clear the search criteria and start over again.
- 5) The system will respond with a prompt at the top of the screen indicating the number of indexes (if any) which fits the search criteria. Press the [GO]

key to see the listing of "index cards" which contain profile information pertinent to each document which fits the search. Press [Next Page] or [Prev Page] to "flip" through the index cards.

- 6) To view an index card's associated document, press [GO] while the pertinent card is displayed on the screen. The system will then display the associated document text within a scrollable window. Use the [Next Page], [Prev Page], [Scroll Up] or [Scroll Down] keys to review the document.
- 7) The scrollable windows will display the document 15 pages at a time. If there are subsequent pages to the order, press the [GO] key again and the system will retrieve and display the additional information. To redisplay a previously viewed 15 page section of the document, press [Prev Text] or [F1].
- 8) To return to the search criteria screen press [FINISH]. To return to the index cards resulting from the last search press [Review List] or [F3].
- 9) To exit from the program, press [FINISH] from the search criteria screen.

ADDITIONAL INFORMATION

Printing Text . . .

To print the entire set of documents (which are currently displayed) press [Print Doc] or [F10]. The system will display a prompt indicating that there is a *printing fee* for the document and the amount of the fee. To continue and print the document and *accept the fee*, Press [GO]. Press [FINISH] to stop the printing process and to avoid print fee assessment.

Identifying Matches or Ranges . . .

The fields on this screen may be utilized to establish whether the system must search for documents which have indexes fitting within a range of information or documents which have indexes matching this information.

To obtain documents whose indexes *match* select information, enter the desired criteria in the "low value" or first occurrence of the field and press [RETURN]. The system will automatically copy the same criteria to the "high value" or second field. For example, in Figure Q1, the system would provide information about indexes in which the recommended order filed with the DOAH Clerk on December 19, 1987.

RULE NUMBER:	_____	_____
RO DATE:	<u>12/19/87</u>	<u>12/19/87</u>
FO DATE:	_____	_____
DCA OPINION DATE:	_____	_____

(Figure Q1)

To obtain documents whose indexes fit within a *range* of information, simply change the second field to reflect a value higher than the one in the first field. For example, in Figure Q2 the system would provide information about all Recommended Orders filed with the DOAH Clerk in December 1987.

RULE NUMBER:	_____	_____
RO DATE:	<u>12/01/87</u>	<u>12/30/87</u>
FO DATE:	_____	_____
DCA OPINION DATE:	_____	_____

(Figure Q2)

Searching for Proper Names . . .

Notice that there is a long and short field for Petitioner, Respondent and Intervenor names. The long field (on the left) is for a company name or an individual's full name. The short field (on the right) is for proper last names only. Utilizing these two fields together, you may search for any configuration of names. For example: In Figure Q3 the search would provide information for anyone with the last name of "Jones" whose first name starts with the letters "Sam" (i.e., Sam, Samuel, Sampson, etc.).

PETITIONER:	<u>SAM</u>	<u>JONES</u>
range thru:	<u>SAMZZZZZZZZZZ</u>	<u>JONES</u>

(Figure Q3)

Searching for DPR & HCA Cases . . .

When searching for cases involving the Department of Professional Regulation (DPR) and/or the Agency for Health Care Administration (HCA) either agency code or prefix may be used. Search results will list cases filed under either or both agencies. For example, to find a case involving the Board of Acupuncture, a code Agency Division code of HCA/Acu or a code of DPR/Acu could be used to access this case.

Searching for Rule Challenge Cases . . .

When searching for cases involving a rule challenge please refer to the ACCESS-CASE SUFFIX CROSS REFERENCE CODE REPORT in Appendix C. This listing will identify all the possible types of rule challenge cases identified to date. Cases filed with the DOAH Clerk prior to 1/1/92 were categorized under a suffix code of "R" only. If the type of rule challenge is unclear, using a search range shown in Figure Q4 will produce results of all type of rule challenges filed with DOAH regardless of the filing date.

DCA OPINION DATE:	_____	_____
AGENCY:	<u> / </u>	<u> - - - /</u>
CASE SUFFIX:	<u>R</u>	<u>RXP</u>
HEARING OFFICER:	_____	_____

continued . . .

Standard Typing

DPR—Type the Division or Board name only, do not include the Department name.

When inputting DPR Agency case no., drop the first Os.

Do not add periods to abbreviations, except when typing et al., etc., or a person's initials.

Input CON numbers: CON (space) & the four digit number.

Pre-1990 new case styling

Div of Alcoholic Beverages & Tobacco
 Div of Land Sales Condo & Mobile Homes
 Crim Justice Standards & Training Comm
 Construction Industry Licensing Bd
 Electrical Contractors Licensing Bd
 Dept of Highway Safety & Motor Vehicles
 Public Employees Relations Comm

Current

DABT
 LSCMH
 CJSTC
 CILB
 ECLB
 DHSMV
 PERC

and	=	&
Assn	=	Association
Bd	=	Board
Comm	=	Commission
		Community
		(except Dept of
		Community Affairs)
Co	=	Company
Corp	=	Corporation
Dept	=	Department
Dist	=	District
Div	=	Division
FL	=	Florida
Inc	=	Incorporated
Jr	=	Junior
Ltd	=	Limited
Mgmt	=	Management
St	=	Saint
		Street
NE	=	Northeast
NW	=	Northwest
SE	=	Southeast
SW	=	Southwest

Standard Agency Abbreviations Typing

non-DPR

Dept of Agri & Consumer S
 City of Boca Raton
 Central FL Flood Control
 Dept of Citrus
 City of Clearwater
 Office of Comptroller
 Dept of Banking & Finance
 Div of Securities
 County of Gadsden
 County of Hillsborough
 County of Leon
 Dept of Commerce
 Dept of Corrections
 Mental Health Institute
 County of Suwannee

DPR

DPR
 Bd of Accountancy
 Bd of Acupuncture
 Bd of Architecture
 Barbers Bd
 Bd of Chiropractic Examrs
 CILB
 Clinical Social Workers
 Bd of Cosmetology
 Bd of Dentistry
 ECLB
 FL Real Estate Comm
 Bd of Funeral Directors
 Bd of Geologist
 Hearing Aid Specialists

City of Tarpon Springs
 Dept of Business Reg
 DABT
 Div of Hotels & Restuar
 FLSCMH
 Div of Pari-Mutual Wager
 State Athletic Comm
 Dept of Community Affairs
 DER
 Dept of General Services
 Dept of Legal Affairs
 Dept of Law Enforcemen
 CJST
 DN
 Marine Fisheries Com
 Dept of Administratio
 Administration Com
 Career Service Com
 DOA
 Human Relations Com
 Bureau of Insurance
 Div of Retirement
 DOE
 Dept of Lottery
 Dept of State
 Div of Corporations
 Div of Licensing
 Bureau of Mgmt Systems
 DOT

Bd of Landscape Architect
 Bd of Land Surveyors
 DPR (Marriage & Family)
 Bd of Massage
 Bd of Medical Examiners
 Mental Health Counselors
 Bd of Naturopathic
 Bd of Nursing Home Admins
 Bd of Nursing
 Bd of Opticianry
 Bd of Optometry
 Bd of Osteopathic
 Bd of Paramedics
 Bd of Pharmacy
 Bd of Pilot Commissioners
 Bd of Podiatry
 Bd of Profess Engineers
 Bd of Psychological Exams
 Bd of Physical Therapists
 Bd of Talent Agencies
 Bd of Veterinary Medicine

Divison of Administrative Hearings Access—Agency/Division Cross Reference Code Report

Search Code	Search Code Description
AAN	Alachua Annexation
AGR	Dept. of Agri & Consumer Services
AGRA	Agriculture-Produce Dispute Cases
BCS	Broward County Sheriff 's Office
CH CC	City of Clearwater
CH CE	City of Eustis
CH CH	County of Hillsborough
CH CL	County of Leon
CH CP	County of Pinellas
CH CSH	City of Safety Harbor
CH CT	City of Tallahassee
CH CTS	City of Tarpon Springs
CH ECUA	Escambia County Utilities Authority
CH EWD	Englewood Water District
CH JEPA	Jax Environ Protection Agency
CH PPC	Pinellas Planning Council
CIT	Dept of Citrus
CMP	Office of Comptroller
CMPBF	Dept of Banking & Finance
CMPPC	Citrus Canker
CMPSec	Div of Securities
COM	Dept of Commerce
COR	Dept of Corrections
CORMHI	Mental Health Institute
CPA	Canaveral Port Authority
DBR	Dept of Business Regulation
DBRDABT	Div of Alcoholic Beverages & Tobacc
DBRHR	Div of Hotels & Restaurants
DBRLSCMH	Land Sales Condominiums & Mobile Hm
DBRPMW	Div of Pari-Mutual Wager

DBRSAC	State Athletic Comm	DOE48	Orange County Sch Bd
DCA	Dept of Community Affairs	DOE49	Osceola County Sch Bd
DCAFHF	FL Housing Finance Agency	DOE50	Palm Beach County Sch Bd
DER	Dept of Environmental Regulation	DOE51	Pasco County Sch Bd
DGS	Dept of General Services	DOE52	Pinellas County Sch Bd
DLA	Dept of Legal Affairs	DOE53	Polk County Sch Bd
DLAVC	Victims Compensation	DOE54	Putnam County Sch Bd
DLE	Dept of Law Enforcement	DOE55	St Johns County Sch Bd
DLECJSTC	Criminal Justice Stndrds & Trng Com	DOE56	St Lucie County Sch Bd
DNR	Dept of Natural Resources	DOE57	Santa Rosa County Sch Bd
DNRCA	Canal Authority of FL	DOE58	Sarasota County Sch Bd
DNRMFC	Marine Fisheries Comm	DOE59	Seminole County Sch Bd
DOA	Dept of Administration	DOE60	Sumter County Sch Bd
DOAAC	Administration Commission	DOE61	Suwannee County Sch Bd
DOAAP	Abandonment of Position	DOE62	Taylor County Sch Bd
DOACSC	Career Service Comm	DOE63	Union County Sch Bd
DOADOAH	Div of Administrative Hearings	DOE64	Volusia County Sch Bd
DOAHRC	Human Relations Commission	DOE65	Wakulla County Sch Bd
DOAIns	Div of State Employees Insurance	DOE66	Walton County Sch Bd
DOARet	Div of Retirement	DOE67	Washington County Sch Bd
DOE	Dept of Education	DOEBCC	Broward Community College
DOE01	Alachua County Sch Bd	DOEBOR	Bd of Regents
DOE02	Baker County Sch Bd	DOEBS	Div of Blind Services
DOE03	Bay County Sch Bd	DOECFCC	Central FL Community College
DOE04	Bradford County Sch Bd	DOEDay	Daytona Bch Community College
DOE05	Brevard County Sch Bd	DOEIPC	Education Practices Commission
DOE06	Broward County Sch Bd	DOEPCD	EPC-Declaration of Default Cases
DOE07	Calhoun County Sch Bd	DOEFAMU	FL A & M University
DOE08	Charlotte County Sch Bd	DOEFAU	FL Atlantic University
DOE09	Citrus County Sch Bd	DOEFIU	FL International University
DOE10	Clay County Sch Bd	DOEFJJC	FL Jr College of Jacksonville
DOE11	Collier County Sch Bd	DOEFKCC	FL Keys Community College
DOE12	Columbia County Sch Bd	DOEFSU	FL State University
DOE13	Dade County Sch Bd	DOEHCC	Hillsborough Comm College
DOE14	DeSoto County Sch Bd	DOEIC	Bd of Indep Colleges & Universities
DOE15	Dixie County Sch Bd	DOEIPSVTT	Ind Post-Sec/Vo-Tech/
DOE16	Duval County Sch Bd	DOEIRCC	Indian River Community College
DOE17	Escambia County Sch Bd	DOELCCC	Lake City Community College
DOE18	Flagler County Sch Bd	DOELSCC	Lake-Sumter Community College
DOE19	Franklin County Sch Bd	DOEMDCC	Miami-Dade Comm College
DOE20	Gadsden County Sch Bd	DOEMJC	Manatee Jr College
DOE21	Gilchrist County Sch Bd	DOENFJC	North FL Jr College
DOE22	Glades County Sch Bd	DOEOWJC	Okaloosa-Walton Jr College
DOE23	Gulf County Sch Bd	DOEPBJC	Palm Beach Jr College
DOE24	Hamilton County Sch Bd	DOEPCC	Polk Comm College
DOE25	Hardee County Sch Bd	DOEPHCC	Pasco-Hernando Community College
DOE26	Hendry County Sch Bd	DOESCC	Seminole Community College
DOE27	Hernando County Sch Bd	DOESDB	Sch for the Deaf & Blind
DOE28	Highlands County Sch Bd	DOESFCC	Santa Fe Community College
DOE29	Hillsborough County Sch Bd	DOESFJC	South FL Jr College
DOE30	Holmes County Sch Bd	DOESJRJC	St Johns River Jr College
DOE31	Indian River County Sch Bd	DOESPJC	St Petersburg Jr College
DOE32	Jackson County Sch Bd	DOESUS	State University System
DOE33	Jefferson County Sch Bd	DOETCC	Tallahassee Community College
DOE34	Lafayette County Sch Bd	DOEUCF	University of Central FL
DOE35	Lake County Sch Bd	DOEUF	University of FL
DOE36	Lee County Sch Bd	DOEUM	University of Miami
DOE37	Leon County Sch Bd	DOEUNF	University of North FL
DOE38	Levy County Sch Bd	DOEUSF	University of South FL
DOE39	Liberty County Sch Bd	DOEUWF	University of West FL
DOE40	Madison County Sch Bd	DOEVCC	Valencia Community College
DOE41	Manatee County Sch Bd	DOL	Dept of Lottery
DOE42	Marion County Sch Bd	DORPilot	Bd of Pilot Commissioners
DOE43	Martin County Sch Bd	DOS	Dept of State
DOE44	Monroe County Sch Bd	DOSCorp	Div of Corporations
DOE45	Nassau County Sch Bd	DOSLic	Div of Licensing
DOE46	Okaloosa County Sch Bd	DOSLicS	License Denial Cases
DOE47	Okeechobee County Sch Bd	DOSMan	Bureau of Mgmt Systems

continued . . .

DOT	Dept of Transportation	HRSAMH	Anclote Manor Hospital
DOTT	DOT-Sign Cases	HRSASAS	Audit Services
DPR	Dept of Professional Regulations	HRSASCA	Office of Central Administrative Sv
DPRAcc	Bd of Accountancy	HRSASPE	Office of Personnel
DPRACU	Bd of Acupuncture	HRSBCLMH	Broward County Mental Health
DPRArch	Bd of Architecture	HRSBL	Bay Life Acute Care Center
DPRASP	Bd of Audiology & Speech Pathology	HRSBP	Bay Pines VA Medical Center
DPRAUct	Bd of Auctioneers	HRSC	HRS-Child Abuse Cases
DPRBA	Behavior Analysis	HRSEMS	Emergency Medical Services
DPRBarb	Barbers Bd	HRSFSH	FL State Hospital
DPRChir	Bd of Chiropractic Examiners	HRSGPWMH	G. Pierce Wood Memorial Hospital
DPRCILB	Construction Industry Licensing Bd	HRShor	Horizon Hospital
DPRClin	Clinical Social Workers	HRSJAHVH	James A. Haley Veteran's Hospital
DPRCoS	Bd of Cosmetology	HRSNEFSH	Northeast FL State Hospital
DPRDent	Bd of Dentistry	HRSNFETC	North FL Evaluation & Treatment Ctr
DPRECLB	Electrical Contractors Licensing Bd	HRSOPCMS	Prog of Children's Medical Services
DPRFREAB	FL Real Estate Appraisal Bd	HRSOPHEN	Office of Entomology
DPRFREC	Div of Real Estate	HRSOPHLS	Office of Laboratory Services
DPRFun	Bd of Funeral Directors	HRSOPHR	Office of Radiological Health Servs
DPRGeo	Bd of Geologist	HRSOPLC	Office of Licensure & Certification
DPRHrg	Hearing Aid Specialists	HRSOSRA	Office of Refugee Administration
DPRLA	Bd of Landscape Architects	HRSPDAA	Program Dev for Aging & Adult Servs
DPRLS	Bd of Land Surveyors	HRSPDCF	Office of Community Medical Faciltis
DPRMarr	DPR (Marriage & Family)	HRSPDCM	Prog Devel for Children Med Service
DPRMass	Bd of Massage	HRSPDCYF	Prog Dev for Children Youth & Famls
DPRME	Bd of Medical Examiners	HRSPDDM	Program Devl for Medicaid Disputes
DPRMH	Mental Health Counselors	HRSPPDES	Developmental Services Program
DPRNat	Bd of Naturopathic	HRSPDHE	Economic Services Program
DPRNHA	Bd of Nursing Home Administrators	HRSPDHERX	Health Program Office
DPRNurs	Bd of Nursing	HRSPDHS	Health Program Office Pharmacy
DPROpti	Bd of Opticianry	HRSPDMH	Program Devl for Human Services
DPROpto	Bd of Optometry	HRSPDVR	Program Devl for Mental Health
DPROst	Bd of Ostopathic	HRSPIHRS	Program Devl for Vocational Rehab
DPRPara	Bd of Paramedics	HRSSara	HRS-Child Support Cases
DPRPhar	Bd of Pharmacy	HRSSFETC	Sarasota Palms Hospital
DPRPilot	Bd of Pilot Commissioners	HRSSFESH	South FL Evaluation & Treatment Ctr
DPRPMW	Div of Pari-Mutual Wagering	HRSSH	South FL State Hospital
DPRPod	Bd of Podiatry	HRSTHH	Seagrave House
DPRProf	Bd of Professional Engineers	HRSVAH	Tampa Heights Hospital
DPRPsy	Bd of Psychological Examiners	HRSVAMC	Veterans Administration Hospital
DPRPT	Bd of Psysical Therapists	HRSWFCCC	Veterans Administration Medical Ctr
DPRTA	Bd of Talent Agencies	HSM	West FL Community Care Center
DPRVet	Bd of Veterinary Medicine	INS	Dept of Highway Safety & Motor Vehc
ETH	Ethics Commission	INSMA	Dept of Insurance & Treasurer
FWF	Game & Fresh Water Fish Commission	INSRateA	Medical Arbitration
GOV	Office of the Governor	INSRateC	Dept of Ins & Treasurer-Rate/Auto
GOVFLWAC	FL Land & Water Adjudicatory Comm	JAX	Dept of Ins & Treas-Rate/Casualty
GOVHCCB	Healthcare Cost Containment Bd	LES	Jacksonville (archived files)
HCAAcu	DPR AHCA Bd of Acupuncture	LESAP	Dept of Labor & Employment Securits
HCAChir	DPR AHCA Bd of Chirpractic Examrs	LESET	Bureau of Agricultural Programs
HCAClin	DPR AHCA Clinical Social Workers	LESSI	Div of Employment & Training
HCACON	DPR AHCA Certificate of Need Cases	LESUC	Bureau of Self Insurance
HCADent	DPR AHCA Bd of Dentistry	LESVR	Div of Unemployment Compensation
HCAHCCB	DPR AHCA Hosp. Cost Containment Bd	LESWC	Div of Vocational Rehabilitation
HCAM	DPR AHCA Bd of Medicine	LRE	Div of Workers Compensation
HCAMarr	DPR AHCA Marriage & Family Therapists	NEF	Loxahatchee River Envirn Cntrl Dstr
HCAMH	DPR AHCA Mental Health Counselors	NFB	Northeast FL Regional Planning Cncl
HCANat	DPR AHCA Bd of Naturopathic	PAC	Northern Palm Bch Cnty Wtr Cntr Dst
HCAOPLC	DPR AHCA Office of Licensure & Cert	PCC	Performing Arts Center Authority
HCAOpto	DPR AHCA Bd of Optometry	PCH	Pinellas County Constr Licensing Bd
HCAOst	DPR AHCA Bd of Osteopathic	PPC	Panama City Housing Authority
HCAPhar	DPR AHCA Bd of Pharmacy	PSC	Parole & Probation Commission
HCAPod	DPR AHCA Bd of Podiatry	REV	Public Service Commission
HCAPsy	DPR AHCA Bd of Psychologists	SFR	Dept of Revenue
HCAPT	DPR AHCA Bd of Physical Therapists	SLE	South FL Regional Planning Council
HCAVet	DPR AHCA Bd of Veterinary Medicine	SMDSWF	St Lucie Co Expressway Authority
HRS	Dept of Health & Rehabilitative Srv	STA	Southwest FL Water Mgmt District
			State Attorney

WMDNWF	Northwest FL Water Mgmt District
WMDSFW	South FL Water Mgmt District
WMDSJR	St Johns River Water Mgmt District
WMDSRW	Suwannee River Water Mgmt District
WMDSWF	Southwest FL Water Mgmt District
WMDWCR	West Coast Regional Wtr Supply Auth

TOTAL NUMBER OF RECORDS: 307

Division of Administrative Hearings Access—Case Suffix Cross Reference Code Report

Search Code	Search Code Description
AAN	Alachua Annexation
* B	Baker Act
BID	Bid Case
C	Child Abuse
D	Declaration of Default
DRI	Develop Regional Impact
**E	Exceptional Education
EC	Ethics Commission
EPP	Elec Power Plant Site Ct
F	Fees Case
GM	Growth Management
H	Healthcare Cost Cnt Board
HSR	High Speed Rail Transport
IC	Indigent Care
K	Citrus Canker
L	Low Income Energy Asstan.
MA	Medical Arbitration
ML	Magnetic Levitation Cases
*** R	Rule Challenge
RE	Rule/Emergency
REP	Rule/Emergency/Prisoner
RGM	Rule/Growth Management
RP	Rule/Proposed
RPP	Rule/Proposed/Prisoner
RU	Rule/Unpromulgated
RUP	Rule/Unpromulgated/Prisnr
RX	Rule/Existing
RXP	Rule/Existing/Prisoner
S	DOS—License Denial Case
T	DOT—Sign Case
TL	Transmission Line Siting
VC	Victims Compensation
VR	Vested Rights

TOTAL NUMBER OF RECORDS: 33

- * Restricted from public viewing pursuant to Chapter 394.459(9)(f), Florida Statutes.
- ** Restricted from public viewing pursuant to Chapter 230.23(4)(m)4, Florida Statutes.
- *** Prior to January 1, 1992, all Rule Challenge cases were categorized under the case suffix of "R" only.

Division of Administrative Hearings Access—Hearing Officer Cross Reference Code Report

Search Code	Search Code Description	Present/Former?
Adams	Charles C. Adams	Present
Alexander	Donald R. Alexander	Present
Arrington	Claude B. Arrington	Present
Ayers	K. N. Ayers	Present
Benton	Robert T. Benton, II	Present
Bradwell	James E. Bradwell	Present
Caleen	R. L. Caleen, Jr.	Former
Carpenter	R. T. Carpenter	Former
Cave	William R. Cave	Present
Clark	Mary Clark	Present
Cleavinger	Diane Cleavinger	Present
Conn	Donald D. Conn	Former
Davis	Ella Jane P. Davis	Present
David	Don W. Davis	Present
Dean	Stephen F. Dean	Present
Diez	Jose Diez-Arguellas	Former
Dodson	Michael P. Dodson	Former
Donnelly	Veronica E. Donnelly	Former
Dorsey	William R. Dorsey, Jr.	Present
Grubbs	Diane A. Grubbs	Former
Hayman	Jane C. Hayman	Former
Hunter	Eleanor M. Hunter	Present
Johnston	J. Lawrence Johnston	Present
Kendrick	William J. Kendrick	Present
Kiesling	Diane K. Kiesling	Present
Kilbride	Daniel M. Kilbride	Present
Lerner	Stuart M. Lerner	Present
Manry	Daniel S. Manry	Present
Meale	Robert E. Meale	Present
Menton	J. Stephen Menton	Present
Oldham	Thomas C. Oldham	Former
Parrish	Michael M. Parrish	Present
ParrishJ	Joyous D. Parrish	Present
Pollock	Arnold H. Pollock	Present
Powell	Errol H. Powell	Present
Quattlebaum	William F. Quattlebaum	Present
Rigot	Linda M. Rigot	Present
Ruff	P. Michael Ruff	Present
Sartin	Larry J. Sartin	Present
Sherrill	William C. Sherrill	Former
Smith	Sharyn L. Smith	Former
Stevenson	Matthew W. Stevenson	Former
Tremor	Diane D. Tremor	Former
York	James W. York	Present

TOTAL NUMBER OF RECORDS: 44

Minutes

Administrative Law Section

Executive Council Meeting

Friday, June 25, 1993
Lake Buena Vista, Florida

I. Call to Order

The meeting was called to order by Section Chair G. Steven Pfeiffer.

Members present: G. Steven Pfeiffer, Stephen T. Maher, Vivian F. Garfein, Linda M. Rigot, Betty Steffens, Catherine Lannon, Kathy Castor, Ralf G. Brooks, Dave Watkins, Veronica Donnelly, Bill Williams, Carol Forthman.

Others in attendance were: Dan Stengle, Rex Ware, Peter D. Ostreich

II. Preliminary Matters

A. The chair acknowledged the recent death of Jon Rossman and dedicated the annual meeting to his memory.

Tom Smith, Chair-elect of the Bar's CLE Committee was introduced.

C. Consideration of the minutes from the April 30, 1993 meeting

The minutes from the prior meeting were approved.

D. Treasurer's Report

The Treasurer reported that there was approximately \$26,000 in the Treasury.

E. Chair Report

The chair reserved his report for the Annual Meeting.

III. Committee Reports

A. Long Range Planning Committee

Stephen T. Maher gave the committee report. It was reported that five Administrative Law Section events are planned for the 1993-94 bar year. CLE programs are planned for the fall and spring, the Pat Dore Memorial Administrative Law Conference is planned for early October and the Public Utilities Committee, which is merging into the section, will present its annual program in April, 1994 as a section event for the first time next year.

B. CLE Committee

It was announced that Bill Dorsey accepted a position as a Federal Ad-

ministrative Law Judge and is leaving the State in a few weeks. Carol Forthman reported that a joint seminar with the Local Government Section is planned for February. Kathy Castor will co-chair with Jim Linn.

C. Publications Committee

Linda Rigot reported that two columns out of five for the coming year's Florida Bar Journal are committed. Dave Watkins has agreed to serve as Editor. There will be a Special Issue of the Journal in January, 1994 on Small Firm Solo practitioners. Bill Williams has agreed to write a piece on "Leaving Government—The Problems and Perils of Starting Your Own Practice".

Veronica Donnelly is retiring as co-editor of the Newsletter. John Newton and Bill Hyde will serve as co-chairs during the coming year. We have been experiencing problems with the printing of the Newsletter. It appears that several other sections of the Bar have been experiencing similar difficulties. The matter will be brought at the next Council of Sections meeting.

D. Finance Committee

Linda Rigot reported that there has not been a meeting of the committee since the last Section meeting.

E. Legislative Committee

Betty Steffens reported that, gratefully, the legislature is still out of session! The House Select Committee on Agency Rules has created an agency task force. Members of the section serving on the task force are Johnny Burris, Steve Pfeiffer, Stephen Maher, Betty Steffens and Dan Stengle. Three working groups have been formed working on the following issues: (1) summary proceedings for those representing themselves, (2) revision to 120.54 rule-making, (3) judicial review and legislative oversight. The task force will meet the 2nd and 4th Wednes-

day of each month until September.

F. Pat Dore Distinguished Professorship Committee

Vivian Garfein reported that the mail merge listing has finally been completed and letters will go out to all of Pat's former students early Fall. Dean Weidner invited Vivian to address the FSU alumni at a reception last night during which pledge cards were distributed. In addition, Vivian, Paul Jess, and members of the Executive Council have been "working" the convention, distributing pledge cards.

G. Task Force Reports

A letter submitted by Gary Stephens will be distributed with the next agenda.

H. Florida Bar Liaison

Stephen Maher reported that the Conference on the Constitutional Convention will be discussed at tomorrow's meeting.

I. Membership Committee

Kathy Castor reported that we have had an increase of 5-6% in membership this past year. Personal letters from the chair were sent to all members of the Environmental and Land Use Law Section, inviting them to join. Kathy anticipates further increases after the Bar dues statements are received.

J. Model Rules Revision Committee

The committee has met twice during the past year and will meet again in July. Steve Pfeiffer plans to have a draft ready for the October Administrative Law Conference. He will continue to chair the committee.

K. Administrative Law Conference

Bill Williams reported that the dates for the conference are October 1 and 2. He further discussed the nine substantive topics under consideration and requested assistance from members of the Executive Council.

L. Public Utilities Law Committee

Denise Bryant informed us that the committee would be meeting in the afternoon.

M. Florida Constitution Conference

A letter has been sent to various individuals requesting participation on the steering committee which, Steve Maher reported, will be balanced between Democrats and Republicans. Steve hopes to involve as many sections as possible and will encourage them to bring issues particular to their sections to the conference.

IV. Old Business*A. Designation Program Issues*

The Local Government section is

very interested in certification. The ELULS sent a questionnaire out to its membership with a 20% response showing over 50% in favor. Members of the Executive Council expressed traditional opposition. Ralf Brooks will continue to chair and monitor this issue.

B. Public Utilities Committee Merger

The group will meet this afternoon; therefore no report.

V. New Business*A. Nominations*

Nominations were as follows:

For continuing terms: Johnny Bur-

ris, Dave Watkins, Kathy Castor, Betty Steffens, and Diane Tremor.

Chair-Elect: Vivian F. Garfein

Secretary: Linda M. Rigot

Treasurer: William E. Williams

Executive Council: Robert Rhodes, Denise Bryant

VI. Time and place of next meeting

The next meeting will be held in conjunction with the Pat Dore Administrative Law Conference.

VII. Adjournment

The meeting was adjourned at 10:05 a.m.

Administrative Law Section**Annual Meeting**

June 25, 1993

Lake Buena Vista, Florida

I. Call to Order

The meeting was called to order at 10:15 a.m.

II. Election of Officers and Members of the Executive Council

Those nominated were elected by acclamation.

III. Comments, Presentation of Awards by Outgoing Chair

Outgoing Chair, Steve Pfeiffer, graciously accepted praise for others good work. He felt that we had the best newsletter of any sections and suggested that we continue to concentrate on substantive issues. He also thanked Bill Dorsey for the excellent CLE programs during the

past year; Bill will be missed by all. Model Rules are well underway and Steve will continue that effort. Membership in the section increased during the past year. Most important of, Steve's goal was to have fun during the past year, and he felt that we had.

Steve presented the following awards:

Bill Dorsey—for serving as CLE chair for the past three years.

Betty Steffens—for her continuing work with the Legislative program.

Bill Hyde—for his unusual recycling of self. After serving as past chair, Bill has returned as co-editor of the newsletter.

Veronica Donnelly—for her work as co-editor of the newsletter.

M. Catherine Lannon—for her

overall contribution to the section.

Linda M. Rigot—for her work as publications chair and Treasurer.

Gene Stillman—a special award from Steve with thanks for his help to the Chair.

IV. Introduction of and Comments by Incoming Chair

Incoming Chair, Steve Maher, thanked the outgoing chair for the past successful year and presented Steve Pfeiffer with a plaque in appreciation. The new Chair briefly reviewed the upcoming events for his term, which include the Florida Constitutional Conference to be held in April.

V. Adjournment

The meeting was adjourned at 10:30 a.m.

Coming up:

Midyear Meeting of The Florida Bar

January 12-15, 1994

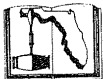
Hilton at Walt Disney World Village

Details in future issues of The Florida Bar News.

FLORIDA ADMINISTRATIVE PRACTICE (4th ed. 1993)



About the Book



This 13-chapter manual, produced in cooperation with the Administrative Law Section, provides a convenient desk reference for attorneys practicing administrative law. Chapters provide in-depth discussion of the Administrative Procedure Act, general administrative practice, and practice before specific state agencies. An appendix contains the full text of *F.S.* Chapter 120, the Model Rules (Fla. Admin. Code Rules 28-1-28-8), and the rules for the Division of Administrative Hearings (Fla. Admin. Code Rules 60Q-1-60Q-4).

The chapter titles and authors are **The Administrative Process And Constitutional Principles**, Johnny C. Burris; **Overview Of The Administrative Procedure Act**, F. Scott Boyd; **Rule Adoption And Review**, Thomas G. Pelham; **Administrative Adjudication**, Robert T. Benton II, G. Steven Pfeiffer, and Katherine Castor; **Informal Proceedings**, Charles Gary Stephens; **Professional And Occupational Licensing**, Veronica E. Donnelly; **Regulatory Agencies**, Robert S. Cohen; **Environmental Agencies**, Randall E. Denker; **Department Of Revenue**, Daniel S. Manry, Jr.; **Public Service Commission**, Kathleen A. Villacorta and Patrick K. Wiggins; **Bid Dispute Resolution**, F. Alan Cummings and Mary P. Piccard; **Judicial Review**, Cynthia S. Tunnicliff; and **Attorneys' Fees And Cost Awards**, Robert T. Benton II.

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Attorney's Fees and Costs in Administrative Proceedings

by David M. Caldevilla
de la Parte & Gilbert, P.A.
Tampa, Florida

A primary purpose of the Administrative Procedure Act is to provide inexpensive and expeditious resolution to disputes arising from state agency activities.¹ Nonetheless, the administrative hearing process can often become protracted and complex, and the legal expenses of prosecuting or defending an administrative proceeding can weigh heavily on the parties involved. These expenses are compounded because most administrative proceedings do not result in monetary awards to the prevailing litigants. Consequently, attorneys should take advantage of the opportunities available to recover their clients' legal expenses in such administrative proceedings.

The statutes most frequently relied upon statutory provisions for awarding attorney's fees and costs in administrative proceedings are the Florida Equal Access to Justice Act of section 57.111, Florida Statutes, and the "improper purpose" provisions of sections 120.57, and 120.59, Florida Statutes. While abundant authority to recover legal expenses in administrative cases can be found in other rules and statutes,² this article focuses on the mechanics and pitfalls of seeking attorney's fees and costs under the more popular statutes.

A. Florida Equal Access to Justice Act

Section 57.111, the Florida Equal Access to Justice Act (the "Act"), provides a means to recover up to \$15,000 in attorney's fees and costs for "a prevailing small business party in any . . . administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust." The Act is intended to remove economic deterrents associated with contesting unreasonable

governmental action. Unlike most other attorney's fees and costs statutes, the Act requires the party seeking recovery to file a separate action upon conclusion of the underlying administrative proceeding. Another unique aspect of the Act is that it allows the prevailing small business party to recover legal expenses incurred while pursuing its attorney's fees.³

The Act includes definitions for all of the important terms. However, these definitions are often subject to varying interpretations and sometimes surprising results. For example, there is considerable case law discussing what constitutes a small business party, a prevailing party, and substantially justified agency actions. These decisions suggest that entitlement to recovery under the Act can at times be unclear.⁴ In addition, the Act prohibits recovery from a state agency which was only a "nominal party" to the proceeding.⁵ There is also an exemption for proceedings "involving establishment of a rate or rule or to any action sounding in tort." Accordingly, attorneys should do some preliminary research to determine whether the administrative proceedings, the client, and the state agency involved fall within the Act. If the issue of entitlement is unclear, the client may wind up incurring additional nonrecoverable legal expenses by pursuing attorney's fees and costs arising from the underlying administrative proceeding. When researching the issue of entitlement, attorneys should note that the Act is patterned after the federal Equal Access to Justice Act (5 USC §504) and, consequently, federal case law on the same subject should be persuasive.⁶

To initiate a proceeding under the Act, a small business party must file a petition for attorney's fees and costs with the Division of Administrative Hearings ("DOAH") within

60 days⁷ of prevailing in the underlying proceeding.⁸ An untimely petition is subject to dismissal.⁹ The allegations must comply with DOAH's pleading requirements set forth in Florida Administrative Code Rule 60Q-2.035(1). The petition must be accompanied by an itemized affidavit executed by the prevailing business party's attorney stating the nature, extent, and monetary value of his or her services and the costs incurred in the proceeding.¹⁰

The agency must file a response within 20 days of the petition being filed. The response must (a) indicate whether the agency seeks an evidentiary hearing, (b) admit or deny the petitioner's allegations, and (c) specify applicability of any defenses. The agency may also file an opposing affidavit specifying each item of disputed fees and costs.¹¹ Failure to timely file a response may result in the petitioner's allegation being deemed admitted.¹²

Within 10 days of the agency's response being filed, the petitioner may request an evidentiary hearing. The parties' failure to timely request an evidentiary hearing may result in a waiver. In that event, the DOAH hearing officer assigned to the case may elect to decide the issues of entitlement and amount based upon the pleadings, supporting documents, and any pertinent DOAH files or records.¹³ Regardless of whether or not an evidentiary hearing is to be conducted, the parties would be wise to file a motion requesting the hearing officer to take official recognition of the pleadings, transcripts, and evidence filed in the underlying administrative proceeding.¹⁴ This will provide the hearing officer and any appellate courts reviewing the case a superior record upon which to base a decision on the issue of attorney's fees and costs.

continued . . .

ATTORNEYS' FEES

from preceding page

B. "Improper Purpose" Statutes

Sections 120.57(1)(b)5 and 120.59(6) both provide for attorney's fees and costs where an adverse party has been involved in "improper" activities during the administrative proceeding. Although these two statutes have similarities, they also differ in several significant respects.

1. Section 120.57(1)(b)5

Under section 120.57(1)(b)5, when a pleading, motion, or other paper is interposed for any "improper purposes, such as to harass or to cause unnecessary delay or for frivolous purpose or needless increase in the cost of litigation", the hearing officer can impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the reasonable attorney's fees and costs incurred because of the filing.

Under a plain reading of section 120.57(1)(b)5, the sanctions can be applied against agencies and non-agencies alike, as well as their attorneys or qualified representatives. Liability for such sanctions cannot be avoided by merely filing a voluntary dismissal or otherwise withdrawing the document filed for improper purpose.¹⁵ The recipient of an attorney's fee award under section 120.57(1)(b)5 need not be a "prevailing party,"¹⁶ nor will sanctions be imposed against a party merely for failing to prevail.¹⁷

As noted in *Mercedes Lighting & Electrical Supply, Inc. v. Dept. of General Svcs.*, 560 So.2d 272 (Fla. 1st DCA 1990), section 120.57(1)(b)5 is similar to Federal Rule of Civil Procedure 11. Accordingly, case law interpreting Rule 11 should be considered persuasive in determining whether an adverse party's legal papers have been interposed for an "improper purpose." Moreover, the *Mercedes* decision itself provides additional guidance:

Examples of improper purpose which were mentioned during the legislative debate of section 120.57(1)(b)5 include

health care certificate of need litigation, where one existing provider of health care services ties up the application of a competitor in administrative proceedings and judicial appeals for years while continuing to enjoy the benefits of a monopoly on services; and environmental permitting proceedings, where a competing developer or a homeowners' group creates administrative and judicial delays in the permitting process so as to bankrupt the applicant developer, either directly through the cost of litigation or indirectly through the loss of financing or foreclosure on the property.

Mercedes Lighting, 560 So.2d at 277-278, n. 5.

In determining whether a document has been filed for an improper purpose, the hearing officer is not to determine whether the party who filed it did so in bad faith. If a "reasonably clear legal justification" can be shown for filing the paper, no improper purpose can be found.¹⁸

It seems fairly clear that the issue of whether a document was filed for an "improper purpose" is a factual one, to be determined by the hearing officer.¹⁹ Although there are decisions suggesting that section 120.57(1)(b)5 attorney's fees can be sought in a separate DOAH proceeding or awarded by a separate DOAH final order,²⁰ the statute is actually silent on this subject and, other than the Act, there is no clear authority giving DOAH jurisdiction to consider a separate petition for attorney's fees and costs. Therefore, caution dictates that counsel should file a motion requesting the sanctions as soon as it becomes clear that an opposing party has filed a document for an improper purpose and, in any event, before the hearing officer relinquishes jurisdiction over the underlying litigation.²¹

An evidentiary hearing is not required to determine whether sanctions should be imposed. However, where there is conflicting evidence on the issue of improper purpose, counsel should attempt to present it to the hearing officer at an appropriate time.²² Moreover, in order to preserve the issue for appeal, the moving parties' proposed recommended order should include proposed findings of fact supporting the allegations of improper purpose. Likewise, evidence and proposed findings

of fact should also be submitted to establish the reasonable amount of attorney's fees and costs to be awarded.

2. Section 120.59(6)

Under section 120.59(6), a prevailing party in any proceeding pursuant to section 120.57(1) is entitled to recover its reasonable attorney's fees and costs from a nonprevailing adverse party. The statute is intended to penalize intervenors who participate in a series of proceedings to harass or otherwise delay their opponents.²³ Unlike section 120.57(1)(b)5, section 120.59(6) does not apply to a prevailing or nonprevailing party that is an agency or to non-agency parties' attorneys or qualified representatives.

The procedure for obtaining an attorney's fee award under section 120.59(6) is clearer than under section 120.57(1)(b)5. Under section 120.59(6)(c), the hearing officer must determine whether the nonprevailing adverse party has participated in the proceeding for an "improper purpose."²⁴ In making that determination, the hearing officer must consider whether the nonprevailing party has participated in two or more other proceedings involving the same non-agency prevailing party and the same project as an adverse party, whether the nonprevailing party failed to establish either the factual or legal merits of its position in the prior proceedings, and whether the factual or legal positions asserted in the pending proceeding would have been cognizable in the previous proceedings. An affirmative answer to these questions raises a rebuttable presumption that the nonprevailing party participated in the pending proceeding for an improper purpose.

As in the case of section 120.57(1)(b)5, improper purpose is a factual determination for the hearing officer. Consequently, counsel should present evidence and proposed findings of fact on this issue before the hearing officer renders a recommended order. Likewise, evidence and proposed findings of fact should be submitted as to the reasonable amount of attorney's fees and costs to be awarded. Once the hearing officer makes these factual

determinations in a recommended order, the agency having final order authority must award the attorney's fees and costs to the prevailing party, unless the hearing officer's findings of fact are not supported by competent substantial evidence.²⁵

C. Conclusion

While the circumstances under which sections 57.111, 120.57(1)(b)5, and 120.59(6) can be applied are indeed limited in scope, such circumstances can and do arise. If attorney's fees and costs are not requested, they will not be spontaneously awarded. Therefore, to assure effective and economical representation to clients, administrative lawyers should be aware of these statutes and attempt to take advantage of them when applicable.

Endnotes:

¹ See, e.g., *State Rd. Dept. v. Cone Bros. Contracting Co.*, 207 So.2d 489 (Fla. 1st DCA 1968).

² For example, the following provisions of the Florida Statutes can, under appropriate circumstances, entitle the prevailing party to recover attorney's fees and costs incurred in an administrative proceeding or subsequent appeal or enforcement action: §59.46 (appellate proceedings); §§ 112.3187(8)(d) and 112.31985(3)(k) (Code of Ethics of Public Officers and Employees, Whistle Blower's Act); §120.535(6) (agency failure to proceed with required rulemaking); §120.57(1)(b)10 (appeal from agency's final order); §120.575 (taxpayer contest proceedings); §120.69 (circuit court enforcement of agency action); §163.3213(8) (administrative review of local land development regulations); §175.391 (municipal firefighters' pension funds); §185.40 (municipal police officers retirement trust funds); 213.015(14) (administrative actions concerning state tax assessments, collection, and enforcement processes); §408.039 (appeals from final orders involving certificate of need applications); §443.041(2)(b) (appeals from unemployment compensation decisions); §447.208(3) (career service employee disputes); §§ 447.503(6)(c) and 447.504(3) (unfair labor practice disputes); §445.228(1) (circuit court enforcement of agency final order); §§ 760.10(13) and 760.35 (discriminatory housing practice disputes). Moreover, where discovery under the Florida Rules of Civil Procedure has been adopted by the presiding agency's rules, attorney's fees and costs are available as a sanction for failure to provide discovery or for disputing matters set forth in a request for admissions. See, Fla. Admin. Code 60Q-2.019; Fla.R.Civ.P. 1.380. See also, *A Professional Nurse, Inc. v. HRS*, 519 So.2d 1061 (Fla. 1st DCA 1988).

³ The Act provides for additional recovery when the prevailing small business party defends against an agency's appeal of a final

order awarding attorney's fees, or when the prevailing small business party must resort to mandamus to enforce such a final order. See, §57.111(4)(d) and (5), Fla. Stat. The Act has also been construed to allow recovery for the fees and costs incurred by the prevailing small business party in litigating under the Act. See, e.g., *Nordal v. Dept. of Professional Reg.*, 12 FALR 1182, 1185 (DOAH 1990); *Mal-*

colm Lewis Hardy & Aquatic Realty v. Dept. of Professional Reg., 11 FALR 5174, 5180 (DOAH 1989).

⁴ See, e.g., *Thompson v. HRS*, 533 So.2d 840 (Fla. 1st DCA 1988) (state employee is not a small business party); *Dept. of Professional Reg., Div. of Real Estate v. Toledo Re-*

continued . . .

Fall Fund Raising for Pat Dore Endowed Professorship Underway

by Vivian F. Garfein

The Administrative Law Section has pledged to raise \$100,000 to establish an endowed professorship in memory of FSU College of Law professor, Patricia Ann Dore. State matching funds have been sought by the College of Law to create a \$150,000 endowment to fund the professorship in perpetuity. The endowment will be used to support teaching, research and writing in Florida Administrative Law. We are now beginning our drive to raise the funds needed for the endowed chair, and are asking for your help.

Patricia Dore served on the law school faculty from 1970 until her untimely death on January 11, 1992. Pat was a widely known and highly respected expert on Florida Administrative Law. She played a key role in the development, enactment and revision of the Florida Administrative Procedure Act. She also served as a consultant to the Constitutional Revision Commission in 1978, drafting Article I, Section 23 of the Florida Constitution, commonly known as the privacy amendment.

The decision to endow a named chair was made not only to honor Professor Dore's memory, but also to continue her work. The endowment will ensure that teaching and scholarship in the area of Florida Administrative Law will continue at the FSU College of Law and be available both to students and to members of all branches of Florida government. We believe that the wide use of the APA in state government makes it essential that the law evolve in a way that reflects good public policy. Good scholarship can promote this goal and provide a source of information unbiased by particular interests.

Here's how you can help. Pledge or pay some amount to the Pat Dore Professorship. Several former students have pledged as much as \$1,000 each! If every member of the section would pledge anywhere from \$50 to \$250, our goal will be reached. We hope to raise the necessary funds by April 29, 1994—which would have been Pat's 50th birthday.

Send your pledge or check to:

FSU College of Law
Dore Endowed Professorship
c/o Development and Alumni Affairs
425 West Jefferson
Tallahassee, Florida 32306-1034

Your contribution is tax deductible. Please join us in establishing this important professorship in honor of one of Florida's most distinguished legal scholars.

ATTORNEYS' FEES

from preceding page

alty, Inc., 549 So.2d 715 (Fla. 1st DCA 1989) (real estate broker's employee is not a small business party). *But see, McAllister v. Dept. of State, Div. of Licensing*, 9 FALR 4064 (DOAH 1987) (polygraph examiner employed by sheriff's office was a small business party); *Larker v. Dept. of Professional Reg.*, 12 FALR 4730 (DOAH 1990) (licensee in disciplinary proceeding was a small business party where complained of conduct was performed in licensee's capacity as a principle of a corporation and such conduct was outside practice of profession regulated by agency); *S.G. v. HRS*, 14 FALR 1817 (DOAH 1992) (licensee who was corporation's alter ego was entitled to recovery under the Act).

⁵ §57.111(4)(d)1, Fla. Stat.; Fla. Admin. Code Rule 60Q-2.035(5)(a)5.

⁶ *See, Gentile v. Dept. of Professional Reg.*, 513 So.2d 672 (Fla. 1st DCA 1987).

⁷ *See, §57.111(4)(b)*, Fla. Stat.; Fla. Admin. Code Rule 60Q-2.035(1). *See generally, Eager v. Florida Keys Aqueduct Authority*, 605 So.2d 883 (Fla. 3d DCA 1992) (under DOAH's 5 day mailing rule, petition for attorney's fees and costs filed 63 days from issuance date of appellate court's mandate was timely).

⁸ A small business party "prevails" in an administrative proceeding when: (a) a final order has been entered in its favor and the final order has not been reversed on appeal or the time for seeking judicial review of the final order has expired; (b) a settlement favorable to the small business party has been obtained on a majority of the issues it raised in the proceeding; or (c) the agency has sought a voluntary dismissal. *See, §57.111(3)(c)*, Fla. Stat.

⁹ *Minkes v. Dept. of Professional Reg.*, 11 FALR 1818 (DOAH 1989), *affirmed*, 550 So.2d 1175 (Fla. 3d DCA 1989) (statutory time period is jurisdictional). *But see, Malcolm Lewis Hardy & Aquatic Realty, Inc.*, 11 FALR at 5177-80 (applying the doctrine of equitable tolling); *Carl Matthews Construction School, Inc. v. Dept. of Transportation*, 13 FALR 2469 (DOAH 1991) (applying doctrine of equitable tolling).

¹⁰ Fla. Admin. Code Rule 60Q-2.035(3).

¹¹ §57.111(4)(c), Fla. Stat.; Fla. Admin. Code Rule 60Q-2.035(5)(a).

¹² *See, e.g., Dept. of Environmental Reg. v. Puckett Oil*, 577 So.2d 988 (Fla. 1st DCA 1991) (where agency fails to file any response, hearing officer may properly conclude that agency has waived its right to respond; however, hearing officer also has discretion to allow agency's late-filed response).

¹³ Fla. Admin. Code Rule 60Q-2.035(6) and (7).

¹⁴ *See, §120.61*, Fla. Stat.; Fla. Admin. Code 60Q-2.020. *See also, Ann & Jan Retirement Villa, Inc. v. HRS*, 580 So.2d 278,279 (Fla. 4th DCA 1991).

¹⁵ *See, Corp. of the President of the Church of Jesus Christ of Latter Day Saints v. St. Johns River Water Management District*, 13 FALR 1014 (DOAH 1991).

¹⁶ *Corp. of the President*, 13 FALR 1019; *High Point of Orlando/Calton Homes v. Central Florida Wetlands Society, Inc.*, 13 FALR 268 (DOAH 1992).

¹⁷ *See, e.g., Brevard County Bd. of County Commissioners v. Sloan Construction Co.*, 14 FALR 3155 (DOAH 1992).

¹⁸ *Mercedes Lighting*, 560 So.2d at 278. *Accord, Good Samaritan Hospital v. HRS*, 582 So.2d 722 (Fla. 4th DCA 1991).

¹⁹ *Compare, Burke v. Harbor Estates Associates, Inc.*, 591 So.2d 1034 (Fla. 1st DCA 1991) (construing "improper purpose" provision of section 120.59(6)).

²⁰ *Elder v. Cargill Fertilizer, Inc.*, 15 FALR 2561 (DOAH 1993); *Sunrise Community, Inc. v. HRS*, 14 FALR 5162 (HRS 1992); *HRS v. WFL*, 13 FALR 2976 (HRS 1991).

²¹ *See, Mercedes Lighting*, 560 So.2d at 279; *Harvey v. Trans Pac, Inc.*, 12 FALR 4378 (DER 1990). In some instances, the DOAH hearing officer will specifically retain jurisdiction in the recommended order to determine the amount of attorney's fees to be awarded under section 120.57(1)(b)5. *See, Castor v. Johnson*, 12 FALR 2986,3003-3005 (EPC 1990).

²² *See, Corp. of the President*, 13 FALR 1019; *Florida Audobon Society v. South Florida Water Management District*, 13 FALR 4169 (SFWMD 1991).

²³ *South Florida Water Management District v. Canoe Creek Property Owners Association, Inc.*, 13 FALR 3971, 3987 (SFWMD 1991).

²⁴ "Improper purpose" is defined as participation in a section 120.57(1) administrative proceeding "primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of licensing or securing the approval of an activity." §120.59(6)(e)1, Fla. Stat.

²⁵ *Burke*, 591 So.2d at 1037.

Mr. Caldevilla is an associate attorney with the law firm of de la Parte & Gilbert, P.A. in Tampa, Florida, where his practice includes providing representation in administrative, environmental, eminent domain, and appellate proceedings. He received his B.A. in 1984 from the University of South Florida and his J.D., with honors, in 1986 from Florida State University.

APA Task Force Convenes

by Sally Bond Mann, Staff Attorney
Select Committee on Agency Rules and Procedures

Over the summer, the House of Representative's Select Committee on Agency Rules and Administrative Procedures met with APA-savvy practitioners (including agency counsel and private sector attorneys), law professors, an appellate judge and legislative staff to review and make recommendations for the revision of Chapter 120, *Florida Statutes* (the Administrative Procedures Act). This "APA Task Force" was subdivided into the following three working areas:

Group 1—Creation of a Summary Procedure Within Chapter 120

Group 2—Revisions to the Rule-making Process

Group 3—Legislative Oversight and Standards of Judicial Review

While drafts of proposed modifications to Chapter 120 will not be available until later this fall (in time for legislative committee meetings), general consensus has been reached by the members of each group as follows:

Group 1 (Summary Procedure): The issue addressed is the perceived need for an expedited and less costly method by which agency final action can be challenged and heard by an independent hearing officer. Participants are exploring creation of a three-

tiered process to replace the current §120.57(1)(b). The new summary procedure would be mandatory for (as-yet undetermined) categories of cases, perhaps those with lower limits of penalty liability like small claims court jurisdiction, and would be a no-discovery process with an independent hearing officer conducting the final hearing either in person or by telephone conference call, if all parties agree. The process would be similar to the American Arbitration Association model, with the hearing officer issuing a recommended order and the agency retaining final order

authority. The shortened procedure would also be available to all other petitioners, with an opt-out provision allowing the parties to move more complicated cases into the extended formal process of the existing §120.57(1)(b).

Group 2 (Rulemaking Process): In the interest of streamlining and clarifying the rulemaking process, this group is exploring a proposal to shift the time for filing a challenge to a proposed rule under §120.54(4). While current law requires that a challenge to a proposed rule be filed within 21 days of publication of the proposed text of the rule, the proposal under consideration would allow the challenge to be made within 21 days of an agency's filing the final text for adoption with the Secretary of State's office. This change would eliminate the need to file a rule challenge

petition until the final text of a rule is available. The proposal is designed to assure that resources expended in challenging a proposed rule are focused on the final text of the rule and not on a preliminary form of the rule. Greater emphasis on the resolution of disputes in the less formal legislative-type public hearing segment of the rulemaking process might also result from this proposal. Another area of interest to the group is the content and quality of the rulemaking record. Several members of the group expressed interest in a proposal which would require that agencies respond to public comment as a part of the rulemaking record. Finally, the group is reviewing the recently amended economic impact statement provisions of the APA. The timeframes provided in the statute for preparation of an EIS and the usefulness of these

statements is being discussed.

Group 3 (Legislative Oversight and Judicial Review): The areas considered by the group include establishing uniform standards of judicial review and providing more effective legislative oversight of agency rule promulgation. The discussion has been free-flowing and far-reaching but little consensus has been obtained thus far on specific proposals. Items discussed include the deference which agencies should have before DOAH, the use of hearsay evidence, and the difference between policy formation and adjudication of individual rights. Oversight discussion has related to the role of JAPC, indexing of final orders, the creation of an ombudsman program for citizens, and the usefulness of the FAW.

Administrative Law Section

Final Statement of Operations, 1992-93 and Budget, 1993-94

	<u>1992-93</u> <u>Budget</u>	<u>1992-93</u> <u>Actual</u>	<u>1993-94</u> <u>Budget</u>				
REVENUE				Meeting Travel	500		500
Dues	\$15,200	\$16,360	\$16,000	CLE Speakers	100		100
Dues Retained by Bar	7,600	8,180	8,000	Committees	500	348	500
Net Dues	\$7,600	\$8,180	\$8,000	Council Meetings	400	356	400
				Bar Annual Meeting	1,200	1,154	1,400
Videotape Sales	\$100	\$205	\$500	Admin. Law Conference	17,500		
Audiotape Sales	200	945	1,000	Pat Dore Memorial	20,000	20,000	
CLE Courses	1,925	3,169	1,150	Awards	350	304	400
Admin. Law Conference	12,000			Hurricane Relief Manual	1,000	1,000	
Interest	<u>2,240</u>	<u>2,245</u>	<u>1,500</u>	Legislative Reception			500
				Council of Sections		300	300
TOTAL REVENUE	<u>\$24,065</u>	<u>\$14,744</u>	<u>\$12,150</u>	Operating Reserve	300		1,307
				Miscellaneous	1,577		
EXPENSES				FAX Processing	100		
Postage	\$850	\$1,120	\$850	Staff Travel	150	131	250
Printing	320	129	350		836	434	400
Office Expenses	500		500	TOTAL EXPENSES	<u>\$51,643</u>	<u>\$30,122</u>	<u>\$14,382</u>
Newsletter	2,500	1,511	3,000	BEGINNING FUND	<u>\$34,455</u>	<u>\$40,154</u>	<u>\$16,943</u>
Membership	500	687	800	BALANCE			
Photocopying	160	104	325	PLUS REVENUES	24,065	14,744	12,150
Officer Travel	2,300	2,544	2,500	LESS EXPENSES	<u>51,643</u>	<u>30,122</u>	<u>14,382</u>
				ENDING FUND BALANCE	<u>\$6,877</u>	<u>\$24,776</u>	<u>\$14,711</u>

All travel and office expense payments are in accordance with Standing Board Policy 5.23. Travel expenses for other than members or Bar staff may be made if in accordance with SBP 5.23(e) (5) (h), available from Bar headquarters upon request.

The section has elected to reimburse CLE speakers at the section's cosponsored courses of expenses in excess of the CLE policy limit of \$50 per day for meals. The excess expenses reimbursed by the section are without limit.

The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

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